No. 75-1312

In the Supreme Court of the United States

OCTOBER TERM, 1976

DON E. WILLIAMS COMPANY, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 1a-12a) is reported at 62 T.C. 166. The opinion of the court of appeals (Pet. App. 13a-20a) is reported at 527 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1975 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on March 13, 1976, and was granted on June 7, 1976 (A.42). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

220-036—76——2

QUESTION PRESENTED

Whether an employer's issuance and delivery of its promissory note to the trustees of its employees' profit-sharing plan qualifies as a deductible "payment" to the plan within the meaning of Section 404(a) of the Internal Revenue Code of 1954, prior to the employer's actual payment of the note.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of Section 404(a) of the Internal Revenue Code of 1954 (26 U.S.C.) and the Treasury Regulations on Income Tax (1954 Code), Section 1.404(a)-1 (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 35–38.

STATEMENT

The pertinent facts were stipulated and may be summarized as follows: Petitioner is an Illinois corporation which serves as a manufacturers' representative and wholesaler for factory tools and supplies. It maintains its books and records and files its income tax returns in accordance with the accrual method of accounting and uses a taxable year ending April 30 (Pet. App. 2a).

Since 1964, petitioner has had a profit-sharing plan for its employees, which was qualified under Section 401(a) of the Internal Revenue Code of 1954. The trustees of the plan were the principal shareholders and officers of petitioner, Don E. Williams, Jr.,

Joseph W. Phillips, Jr., Alice R. Williams,[1] and the First National Bank of Moline (Pet. App. 2a; A. 15).

In the final days of its taxable years ending April 30, 1967, 1968, and 1969, petitioner's board of directors authorized contributions to its profit-sharing plan of $31,589.32, $34,333.26, and $35,337.86, respectively. Petitioner accrued these amounts as liabilities on its books at the close of each taxable year (Pet. App. 3a; Stip. pars. 11–27, A. 15–20).

During the month immediately following the accruals of these liabilities to the profit-sharing plan, petitioner delivered to the trustees of the plan its interest-bearing promissory note payable on demand in the face amount of the accrued liabilities. The notes issued by petitioner in 1967 and 1968 bore interest at six percent and the 1969 note bore interest at eight percent. The notes were guaranteed by the officers and principal shareholders of petitioner (who also served as trustees of the plan) and were secured by collateral consisting of stock of petitioner and the interests of two of the shareholders in the profit-sharing plan. It was stipulated that the value of the collateral plus the net worth of one of the guarantors exceeded the face amount of each note (Pet. App.

[1] The corporate offices and percentage of common stock ownership held by the trustees of the employees' profit-sharing plan were as follows: Don E. Williams, Jr.—president—87.08 percent; Joseph W. Phillips, Jr.—vice president—4.17 percent; and Alice R. Williams—secretary-treasurer—4.58 percent (Stip. par. 3, A. 14).

2a–3a, 14a; Stip. pars. 11–14, 16–20, 22–26, A. 16–20; Exs. 5–16, A. 20–41).

Petitioner subsequently paid these notes by delivering its checks to the trustees of the plan. The dates of issuance and amounts of petitioner's promissory notes and the dates and amounts of the checks petitioner delivered in payment of those notes are as follows (Pet. App. 3a; Stip. pars. 15, 21, 27, A. 17, 18, 20):

Date and amount of promissory note	*Date and amount of payment*
May 26, 1967—$31,589.32	April 4, 1968—$33,353.03 (includes interest of $1,763.71)
May 24, 1968—$34,333.26	April 28, 1969—$36,381.81 (includes interest of $2,048.55)
May 30, 1969—$35,337.86	March 31, 1970—$37,929.31 (includes interest of $2,591.45)

On its income tax returns for its taxable years ended April 30, 1967, 1968, and 1969, petitioner claimed deductions for the liabilities it accrued to the trustees of its employees' profit-sharing plan equal to the face amounts of the promissory notes it issued to the plan during the first months of the following taxable years. On audit, the Commissioner of Internal Revenue determined that petitioner's delivery of its promissory notes to the trustees of its profit-sharing plan did not constitute "payment" within the meaning of Section 404(a) of the Code. He accordingly disallowed the claimed deductions for the years in which petitioner accrued the liabilities in the face amounts of the notes and allowed deductions for those years only to the extent of petitioner's actual payments to the plan (Pet. App. 2a–3a).

In a reviewed decision with three dissents, the Tax Court adhered to its consistent series of rulings over

the past 25 years that an employer's contributions made to its employees' profit-sharing plan in the form of the employer's promissory note did not qualify as a deductible "payment" under Section 404(a) of the 1954 Code and its predecessor provision under the 1939 Code (Pet. App. 1a–12a). The Tax Court accordingly upheld the Commissioner's determination of deficiencies against petitioner totalling $17,053.93 for the years at issue (A. 42).

The court of appeals unanimously affirmed (Pet. App. 13a–20a). It concluded that the language of the statute, the legislative history, the Treasury Regulations, and the decisions of this Court sustain the Commissioner's position that the statutory term "payment" means that the employer must make actual payment to a profit-sharing plan in cash or its equivalent and not by the issuance of its promissory note (Pet. App. 17a–20a).

SUMMARY OF ARGUMENT

A.

Section 404(a) of the Internal Revenue Code permits a deduction for contributions "paid" by an employer to its employees' profit-sharing plan "[i]n the taxable year when paid * * *." During the taxable years at issue, petitioner accrued liabilities to its employees' plan and delivered its secured demand promissory notes to the plan after the close of those taxable years but before it filed its returns. However, petitioner did not pay its obligations represented by the notes until almost one year after their issuance.

Under these circumstances, the Tax Court and the court of appeals correctly held that the issuance and delivery of a promissory note by an employer to its employees' profit-sharing plan is not a deductible "payment" to the plan under Section 404(a).

The language and structure of Section 404(a) establish that an employer must actually "make" a "payment" to the plan during the taxable year in order to qualify for the deduction. This is evidenced by the use of the term "paid" in the statute rather than the "paid or accrued" formulation found in other deduction provisions of the Code. The only exception to the actual payment rule is the grace period applicable to accrual basis taxpayers during the years at issue permitting "payment" to be made prior to the filing of the return.

Petitioner does not deny that Section 404(a) requires more than a mere accrual of a liability but argues that the issuance of its secured promissory notes qualified as actual payments of its contributions. But the legislative history of Section 404(a) demonstrates that it was well understood that the statute placed all taxpayers on the cash basis with respect to their payments to employee plans, regardless of their method of accounting. This policy is likewise reflected in the Treasury Regulations, which have been outstanding for over 30 years. Thus, Section 404(a) conditions the deduction upon the making of an actual disbursement in cash or its equivalent.

This case is therefore controlled by this Court's decisions in *Eckert* v. *Burnet,* 283 U.S. 140, and

Helvering v. *Price,* 309 U.S. 409. In both of those cases, the Court recognized that a taxpayer's giving of his own promissory note was not sufficient to warrant a deduction for payment until the promise to pay represented by the note was made good by actual payment. Here, too, petitioner's giving of its notes does not entitle it to a deduction for a contribution to its employees' plan because "[i]f the note is never paid, [it] has parted with nothing more than [its] promise to pay." *Hart* v. *Commissioner,* 54 F. 2d 848, 852 (C.A. 1).

The fact that petitioner's notes were secured does not warrant a different result. As this Court stated in *Helvering* v. *Price, supra,* 309 U.S. at 414, "the giving of security for performance did not transform the promise into the payment required to constitute a deductible loss in the taxable year." Since petitioner parted with none of its assets upon the issuance of its promissory notes, it is not entitled to a deduction under a statute that requires an actual payment.

B.

The foregoing analysis is in accord with a consistent line of decisions of the Tax Court of more than 25 years' duration. However, three courts of appeals have held that an employer's issuance and delivery of a promissory note to its employees' plan qualifies as a deductible payment.

These decisions rest on two incorrect premises. First, they erroneously assume that the meaning of the term "paid" in Section 404(a) is the same as in

Section 267(a) of the Code. That latter provision disallows deductions by accrual basis taxpayers for accrued and unpaid interest and expenses that its closely related cash basis payee would not include in income. The legislative history of Section 267(a) indicates that Congress intended the word "paid" to have a special meaning in that provision in order to insure symmetrical tax treatment between a payor and its related payee. Thus, if an accrual basis payor issued a note to its related cash basis payee, there was no need to bar the payor's claim to a deduction as long as the payee included the corresponding amount in income. However, these considerations of symmetry have no application here because a qualified employees' profit-sharing plan is exempt from tax so that the employer's contributions are not taxed to the plan.

Secondly, those decisions rely upon the mistaken notion that a demand promissory note is the equivalent of a check. Because checks have replaced currency as the predominant medium of exchange, their delivery is treated as the payment of cash for federal tax purposes. But as this Court's *Eckert* and *Price* decisions demonstrate, promissory notes are not considered payment for tax purposes but merely constitute a promise to pay.

Finally, although the determination of what constitutes payment under the Internal Revenue Code is a question of federal law, the rule we urge in this case is consistent with the law of all of the states, as set forth in the Uniform Commercial Code, that a

promissory note is not payment of an obligation or the equivalent of a check.

ARGUMENT

THE ISSUANCE AND DELIVERY OF A PROMISSORY NOTE BY AN EMPLOYER TO ITS EMPLOYEES' PROFIT-SHARING PLAN DOES NOT QUALIFY AS A DEDUCTIBLE "PAYMENT" TO THE PLAN UNDER SECTION 404(a) OF THE INTERNAL REVENUE CODE

A. INTRODUCTION

This federal income tax case involves an issue relating to the administration of qualified employee pension and profit-sharing plans. The question presented, upon which the courts of appeals have divided, is whether an employer's issuance and delivery of its promissory note to its employees' profit-sharing plan qualifies as a deductible "payment" to the plan within the meaning of Section 404(a) of the Internal Revenue Code of 1954. We submit that both the Tax Court (Pet. App. 1a–12a) and the court of appeals (Pet. App. 13a–20a) correctly answered this question negatively.

Section 404(a) of the Internal Revenue Code of 1954, Appendix, *infra*, p. 35, provides that "[i]f contributions are paid by an employer to * * * a * * * profit-sharing * * * plan," the contributions shall be deductible "[i]n the taxable year when paid * * *." Section 404(a)(6) establishes a special rule for accrual basis taxpayers who make such contributions. It states that "a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of

such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof)."

Here, petitioner, an accrual basis taxpayer, accrued liabilities to its employees' profit-sharing plan prior to the close of its three taxable years at issue and delivered its promissory notes to the plan after the close of those taxable years but prior to the time it was required to file its returns for those years. Pursuant to Section 6072(b) of the Code, a corporation is required to file its income tax return on or before two and one-half months after the close of its taxable year. Since petitioner's taxable year ended April 30, it could have made a "payment" under Section 404 (a)(6) on or before July 15 that would have been deductible for the preceding taxable year.

Thus, if petitioner had paid its accrued liabilities to the plan at the times it delivered its promissory notes to the trustees, it would have come within the special rule of Section 404(a)(6) that enables accrual basis taxpayers to deduct such contributions for the preceding taxable year as long as they are paid prior to the filing of its return for that year.

But petitioner did not "pay" the amounts of the accrued liabilities to its employees' profit-sharing plan. Instead, it delivered its promissory notes which it did not pay until after it filed its returns for the years in which it accrued the corresponding liabilities and claimed deductions. Petitioner therefore did not suffer a reduction in its net assets during the taxable years for which it claimed deductions.

The language of the statute and its legislative history, to which we now turn, show that the payment requirement of Section 404(a) is not met by the issuance and delivery of a promissory note.

AW

B. THE LANGUAGE OF SECTION 404(a) AND ITS LEGISLATIVE HISTORY DEMONSTRATE THAT ONLY ACTUAL PAYMENT BY AN EMPLOYER TO ITS EMPLOYEES' PROFIT-SHARING PLAN IS DEDUCTIBLE

1. The statutory language and structure

Pursuant to Section 446(c) of the 1954 Code,[2] both the cash receipts and disbursements method and the accrual method are permissible methods of accounting for computing taxable income. Under the cash method, a taxpayer must include in income those items which he has actually received or which are available for his receipt. A cash basis taxpayer can deduct only those expenses which he has actually paid out during the taxable year. Conversely, under the accrual method, a taxpayer must include in income those items to which he has a presently enforceable contractual right of receipt, notwithstanding the fact that he may actually receive them in a subsequent taxable year. With respect to expenses, an accrual basis taxpayer may claim deductions for those items which he is presently obligated to pay notwithstanding the fact that he may in fact make actual disburse-

[2] The prior statute, Section 41 of the 1939 Code (26 U.S.C. 1952 ed.), provided that a taxpayer was to compute his net income "in accordance with the method of accounting regularly employed" in keeping his books. Approved standard methods of accounting were permitted as long as they clearly reflected income. See Treasury Regulations 111, Section 29.41-1 (1939 Code).

ment in a subsequent taxable year. See *United States* v. *Anderson,* 269 U.S. 422, 438–441; *Spring City Foundry Co.* v. *Commissioner,* 292 U.S. 182, 184–185.

In recognition of these two permissible methods of accounting, Congress has employed the term "paid or accrued" or "paid or incurred" in many of the deduction provisions of the Code.[3] The use of either of these terms evidences Congress' intention to permit accrual basis taxpayers to deduct these accrued but unpaid items.[4] However, with respect to deductible contributions to employee pension and profit-sharing plans, Congress did not use the term "paid or accrued." Instead, it provided in Section 404(a) that such contributions shall be deductible by the employer "[i]n the taxable year when *paid* * * *" (emphasis supplied).

The use of the term "paid" imposes the requirement of actual payment rather than simply the recognition (accrual) of a liability to make payment. This is confirmed by the special rule for accrual basis taxpayers set forth in Section 404(a)(6). That rule, as we have noted *supra,* pp. 9–10, provides that an accrual basis taxpayer shall be deemed to have made a payment to

[3] See, *e.g.,* Sections 162(a) (trade or business expenses); 163(a) (interest); 164(a) (taxes); 174(a)(1) (research and experimental expenses); 175(a) (soil and water conservation expenses); 177(a) (trademark and trade name expenses); 180(a) and 182(a) (farm expenses); 212 (expenses for the production of income); 216(a) (cooperative housing expenses); and 217 (moving expenses).

[4] See Section 7701(a)(25) of the Code, which provides that "[t]he terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A."

the plan on the last day of the year of accrual *"if the payment * * * is made* not later than the time prescribed by law for filing the return for such taxable year * * *" (emphasis supplied). If an employer's accrual of a liability to its employees' plan were sufficient to justify a deduction, there would be no need for the special grace period rule applicable to accrual basis taxpayers.

Thus, the terms and structure of Section 404(a) establish that an employer must actually "make" a "payment" to its employees' plan in order to qualify for a deduction. Petitioner does not deny that the statute requires more than a simple accrual of the employer's liability to the plan. The only question therefore is what constitutes "actual payment" under the statute.

The legislative history demonstrates that Congress intended to condition the deduction upon the actual payment of cash or its equivalent; the issuance of a promissory note would not constitute a deductible payment under the statute. Indeed, each time Congress has considered these statutes since their original enactment, it has reaffirmed the requirement of actual payment in cash or its equivalent.

2. The legislative history

Section 404 of the 1954 Code is virtually identical to its original predecessor, Section 23(p) of the 1939 Code, which was first enacted as Section 162(b) of the Revenue Act of 1942, 56 Stat. 863. The pertinent Committee Reports refer to the "actual payment"

requirement of the statute as applicable to accrual basis taxpayers. Both the House and Senate Committees stated: "[i]f an employer on the accrual basis defers paying any compensation to the employee until a later year or years under an arrangement having the effect of a stock bonus, pension, profit-sharing, or annuity plan or similar plan deferring the receipt of compensation, he will not be allowed a deduction until the year in which the compensation is paid." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 106 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 141 (1942).[5]

The imposition of an actual payment rule for contributions to employee plans presented a computational problem for accrual basis taxpayers who wished to make the maximum contribution to their employees' plan under the percentage limitations provisions of the statute but who would not be able to ascertain that figure until after the close of the taxable year. Other accrual basis employers expressed concern about making a contribution that would not be deductible against the current year's earnings. See Senate Hearings before the Committe on Finance

[5] The limitation of the actual payment requirement to contributions to employee plans is evidenced by the sentence in the Committee Reports immediately following the sentence quoted in the text. That sentence states: "This provision is not intended to cover the case where an employer on an accrual basis defers payment of compensation after the year of accrual merely because of inability to pay such compensation in the year of accrual." See H.R. Rep. No. 2333, *supra*; S. Rep. No. 1631, *supra*. Thus, in the case of ordinary compensation, an accrual basis taxpayer could claim a deduction for accrued but unpaid items under Section 162(a) of the Code, which employs the "paid or incurred" formulation.

on the Revenue Act of 1942, 77th Cong., 2d Sess. 465 (1942). Accordingly, the Senate Finance Committee added the grace period for accrual basis taxpayers now set forth in Section 404(a)(6) of the Code. As originally enacted, Section 23(p)(1)(E) of the 1939 Code provided for a 60-day period after the close of the taxable year within which an accrual basis taxpayer could make a contribution that would be deductible for the preceding year.

For purposes of this case, the significant aspect of the addition of the grace period for accrual basis taxpayers is that both Congress and taxpayers alike recognized that the statute in effect placed all employers on the cash basis method for purposes of eligibility for deductions to employee pension or profit-sharing plans. In urging the Senate Finance Committee to adopt a grace period for accrual basis taxpayers in order to eliminate the difficulty of determining the proper contribution figure prior to the close of the taxable year, one witness stated that "[e]ven if you qualify * * * [as a tax-exempt profit-sharing plan], the law has been drafted in such a way that all corporations are put on a cash basis on the payment to trusts." See Statement of Richard D. Sturtevant, Assistant Secretary, Jewel Tea Co., Inc., Senate Hearings before the Committee on Finance on the Revenue Act of 1942, 77th Cong., 2d Sess. 455, 465 (1942).

Thus, whatever the employer's method of accounting, it was well understood at the time of the original enactment of what is now Section 404(a) of the Code

that the statute conditioned qualification for a deduction for a contribution to its employee plan upon the making of an actual disbursement in cash or its equivalent. The only exception to this cash basis rule was that an accrual basis employer had an additional 60 days after the close of the taxable year within which to make payment to the plan.[6]

This congressional understanding of the requirement of actual payment was reaffirmed six years after the enactment of the statute. In 1948, the House of Representatives recommended an extension of the grace period applicable to accrual basis taxpayers. Although the Senate declined to do so at that time, the House Committee Report observed that the statute provided that: "[a]n employer on the accrual basis of accounting may under existing law deduct contributions *actually paid* within the first 60 days of the subsequent year." H.R. Rep. No. 2087, 80th Cong., 2d Sess. 13 (1948) (emphasis supplied).

[6] Petitioner correctly notes (Br. 16) that Section 1013(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 923, has amended Section 404(a)(6) of the Code to give cash basis taxpayers the benefit of the grace period within which to make a contribution to an employee plan. See H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 101, 118 (1974); S. Rep. No. 93-383, 93d Cong., 1st Sess. 127-128 (1973); H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 347 (1974); Hearings on Private Pension Plans before a Subcommittee of the Senate Finance Committee (Part I), 93d Cong., 1st Sess. 210, 315, 508, 588, 605, 616 (1973). But the extension of the grace period to cash basis taxpayers does not, as petitioner suggests (Br. 16), support its argument that the giving of a promissory note qualifies as a deductible "payment." The amendment simply permits all taxpayers an additional period after the close of the taxable year within which to make an actual payment in cash or its equivalent.

Finally, in extending the 60-day grace period in 1954 to the time prescribed for filing the tax return for the year of accrual (generally two months and 15 days after the close of the taxable year),[7] Congress reaffirmed the "actual payment" requirement for all taxpayers regardless of their method of accounting. See S. Rep. No. 1622, 83d Cong., 2d Sess. 55, 292 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A151 (1954).

The foregoing excerpts from the legislative history of Section 404(a) demonstrate that on three separate occasions Congress evidenced its intention to impose an "actual payment" rule for deductible contributions to employee plans. This requirement of actual payment is likewise reflected in the pertinent Treasury Regulations issued contemporaneously with the enactment of the statute. Thus, Section 1.404(a)-1(c) of the present Treasury Regulations, which are substantially identical to the Regulations issued under Section 23(p) of the 1939 Code,[8] provides:

> *Deductions under section 404(a) are generally allowable only for the year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his returns on the accrual method of accounting.* * * * This latter provision [Section 404(a)

[7] Section 6072(b) of the Code provides that corporate returns made "on the basis of a fiscal year shall be filed on or before the 15th day of the third month following the close of the fiscal year." See p. 10, *supra*.

[8] See Treasury Regulations 111, Section 29.23(p)-1 (1939 Code); Treasury Regulations 118, Section 39.23(p)-1(d) (1939 Code).

(6)] is intended to permit a taxpayer on the accrual method to deduct such accrued contribution or compensation in the year of accrual, *provided payment is actually made* not later than the time prescribed by law for filing the return for the taxable year of accrual (including extensions thereof) * * *. [Emphasis supplied.]

As a contemporaneous construction of the statute, these Regulations are entitled to great weight. See, *e.g.*, *Bingler* v. *Johnson*, 394 U.S. 741, 749–750; *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501. Moreover, since the promulgation of the Regulations under the 1942 Act embodying the "actual payment" requirement, Congress reenacted the statute without substantial change at the time of the 1954 codification. Under the long-standing decisions of this Court, the administrative construction of the statutory term "paid" as meaning "actual payment" is therefore deemed to have received congressional approval and to have the force of law. See, *e.g.*, *Lykes* v. *United States*, 343 U.S. 118, 127; *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Morrissey* v. *Commissioner*, 296 U.S. 344, 355; *Brewster* v. *Gage*, 280 U.S. 327, 337.

C. *ECKERT* V. *BURNET*, 283 U.S. 140, AND *HELVERING* V. *PRICE*, 309 U.S. 409, ESTABLISH THAT DELIVERY OF A SECURED PROMISSORY NOTE DOES NOT CONSTITUTE "ACTUAL PAYMENT" OF AN OBLIGATION

1. Since Section 404(a) puts all taxpayers on the cash basis method of accounting by requiring actual payment of the contribution, petitioner is subject to the rule governing cash basis taxpayers. As the court

of appeals correctly recognized (Pet. App. 15a–16a), two decisions of this Court establish that the issuance of a promissory note by a cash basis taxpayer does not constitute "payment" for federal tax purposes.

In *Eckert* v. *Burnet*, 283 U.S. 140, the Court unanimously held that the endorser of the note of an insolvent maker could not claim a bad debt deduction upon taking up the note and substituting one of his own notes to the creditor. There, the Court stated, in quoting from the opinion of the Board of Tax Appeals with approval, that the taxpayer "merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or property having a cash value" (283 U.S. at 141; 17 B.T.A. at 266). "A deduction," as the Court observed, "may be permissible in the taxable year in which the [taxpayer] pays cash" (283 U.S. at 141–142).

Similarly, in *Helvering* v. *Price*, 309 U.S. 409, the Court on the authority of *Eckert* rejected the argument, advanced again by petitioner here (Br. 13), that the delivery of a secured note in satisfaction of an obligation gave rise to a tax deduction. First, the Court recognized that "under the doctrine of the *Eckert* case the giving of the taxpayer's own note was not the equivalent of cash to entitle the taxpayer to the deduction" (309 U.S. at 413). Second, the Court concluded that the fact that the promissory note was secured, as here, does not warrant a different result. It stated: "the collateral was not payment. It was given to secure [the] promise to pay, and if [the]

promise to pay was not sufficient to warrant the deduction until the promise was made good by actual payment, the giving of security for performance did not transform the promise into the payment required to constitute a deductible loss in the taxable year" (309 U.S. at 413–414).

Here, too, petitioner's giving of its notes, although secured, does not entitle it to a deduction for a contribution to its employees' plan because "[i]f the note is never paid, [it] has parted with nothing more than [its] promise to pay." *Hart* v. *Commissioner,* 54 F. 2d 848, 852 (C.A. 1).[9] See also *Page* v. *Rhode Island Hospital Trust Co.,* 88 F. 2d 192 (C.A. 1).

Petitioner does not challenge the *Eckert-Price* rule but argues (Br. 17) that it is inapplicable to an accrual basis taxpayer and that such a taxpayer can make a deductible "payment" by giving its promissory

[9] Contrary to petitioner's argument (Br. 17–18), the scope of the *Eckert* rule is not limited to the bad debt deduction at issue in that case. Indeed, the Court in *Price* (309 U.S. at 411–412) specifically rejected the court of appeals' similar suggestion (106 F. 2d at 340), noting that "[t]he reasoning of this Court was broad enough to cover both aspects of the case" (309 U.S. at 413). It is therefore understandable that the lower courts have applied the principle established in *Eckert* and *Price* in denying a variety of claimed deductions. See, *e.g., Cleaver* v. *Commissioner,* 158 F. 2d 342 (C.A. 7), certiorari denied, 330 U.S. 849 (giving of note is not interest "paid" for purpose of the interest deduction); *Jenkins* v. *Bitgood,* 101 F. 2d 17 (C.A. 2) (giving of note is not actual payment for purposes of the loss deduction); *Baltimore Dairy Lunch, Inc.* v. *United States,* 231 F. 2d 870, 875 (C.A. 8) (same); *Guren* v. *Commissioner,* 66 T.C. 118 (delivery of a demand promissory note is not a deductible "payment" of a contribution to a charity); *Petty* v. *Commissioner,* 40 T.C. 521, 524 (Atkins, J., concurring) (same). See also Rev. Rul. 68–174, 1968–1 Cum. Bull. 81.

note. But the statutory terms "paid" and "payment," coupled with the grace period provision and the repeated references in the legislative history to "actual payment," demonstrate that all taxpayers, regardless of their method of accounting, are required to pay out cash or its equivalent within the taxable year or the grace period in order to qualify for the Section 404(a) deduction. "The ordinary and usual meaning of 'paid' is to liquidate a liability in cash." *P. G. Lake, Inc.* v. *Commissioner,* 148 F. 2d 898, 900 (C.A. 5), certiorari denied, 326 U.S. 732. It is a "firmly established principle of tax law that the ordinary meaning of terms is persuasive of their statutory meaning" (*Commissioner* v. *Korell,* 339 U.S. 619, 627–628); there is no indication that Congress intended to depart from this ordinary meaning of the term "paid."[10]

[10] Petitioner argues (Br. 17) that if Congress intended a "liquid form of payment," it would have employed the term "paid in money" as it did in Section 1385(a) of the Code. But since an employer can qualify for a deduction for a contribution to a pension plan by a transfer of property other than money as long as the transfer represents an outlay of assets, the use of the term "paid in money" in Section 404(a) would have been inappropriate. See *Colorado National Bank of Denver* v. *Commissioner,* 30 T.C. 933, holding that a transfer of realty was a "payment" under Section 404(a).

Moreover, the specific list of items set forth in Section 1385(a), dealing with the special tax treatment of cooperatives, was intended to remedy the confusing state of prior decisional law with respect to what items were includable in the gross income of the patron of a cooperative. See H.R. Rep. No. 1447, 87th Cong., 2d Sess. 78–82 (1962); S. Rep. No. 1881, 87th Cong., 2d Sess. 111–117 (1962). The terms of that provision therefore offer no useful analogy to Section 404(a).

To the contrary, in imposing the requirement of actual payment, Congress chose to establish a uniform and objective outlay-of-assets test which would insure that the employees' plan would maintain its liquidity and eliminate the need for the Internal Revenue Service to make an open-ended inquiry into an unlimited number of future years in order to ascertain whether the employer's obligation to its employees' plan was in fact ever paid in a subsequent taxable year.[11] Thus, for purposes of Section 404(a), all taxpayers are placed on the cash method of disbursements to which the *Eckert-Price* rule is applicable. Since

[11] A similar policy of actual payment is applicable to Section 170(a) of the Code, which permits a deduction for "any charitable contribution * * * *payment* of which is *made* within the taxable year" (emphasis supplied). In employing this language, which first appeared in Section 23(o) and (q) of the Revenue Act of 1938, 52 Stat. 463, 464, the pertinent Committee stated (H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938)):

"[T]he deduction for contributions or gifts for charitable and other purposes shall be allowed only for the taxable year in which the contribution is *actually paid* regardless of whether the taxpayer is reporting income on the cash or the accrual basis. The allowance of the deduction in the year when *actually paid* will provide a clearer rule without hardship to the taxpayer and will eliminate the uncertainty in the administration of the deduction." (Emphasis supplied.)

See *Petty* v. *Commissioner*, 40 T.C. 521; *Guren* v. *Commissioner*, 66 T.C. 118. The parallel between Sections 170 and 404(a) of the Code is further illustrated by Section 170(a)(2), which provides that a corporation reporting its income on the accrual basis may deduct a charitable contribution accrued during the taxable year as long as it is "made" within two and one-half months following the close of the taxable year. This grace period is analogous to Section 404(a)(6), which originally applied to accrual basis taxpayers but now applies to all taxpayers.

petitioner parted with none of its assets upon the issuance of its promissory notes, it is not entitled to a deduction under a statute that requires an actual payment.[12]

Finally, in implicit recognition that the actual payment requirement of Section 404(a) was not satisfied by the issuance of its promissory notes, petitioner attempts (Br. 13–14) to recast the transaction to a payment of cash by it to the employees' plan followed by a loan from the plan to petitioner in the amount of the cash advance. But this argument "would require rejection of the established tax principle that a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred." *Commissioner* v. *National Alfalfa Dehydrating*, 417 U.S. 134, 148. See also *Cen-*

[12] Petitioner argues (Br. 12) that "[t]he important issue is whether something of value was transferred by the contributor." Since its notes had value, petitioner urges that it is entitled to a deduction equal to the value of the notes.

Where property is sold or exchanged for notes, the notes are taken into income of the recipient at their fair market value. *Pinellas Ice Co.* v. *Commissioner*, 287 U.S. 462, 469. But it does not follow that a maker's notes must be treated as the equivalent of cash for purposes of determining whether he has made a deductible "payment" by delivery of them. While the note in the recipient's hands can be sold or negotiated, the note in the maker's hands, even if fully secured as in this case, is merely his promise to pay and does not represent a current outlay of cash or other property. See *Jenkins* v. *Bitgood*, *supra*, 101 F. 2d at 19, cited with approval by this Court in *Helvering* v. *Price*, *supra*, 309 U.S. at 414. Indeed, the taxpayer in *Helvering* v. *Price*, 309 U.S. 409, similarly argued that his notes had value in the hands of the recipient. See Brief for the Petitioner, No. 559, October Term, 1939, pp. 16–17.

tral Tablet Mfg. Co. v. *United States,* 417 U.S. 673, 690.[13]

Moreover, petitioner's indirect loan analogy, as well as the very transaction in this case, would have severely adverse consequences under Section 2003(a) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 971. Pursuant to that provision, an employer's issuance of its promissory note to an employee plan is a "prohibited transaction" subject to a five-percent penalty in the amount of the loan. See Section 4975(a) and (c)(1)(B) of the Code. As the pertinent Committee Report states (H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 308 (1974):

> It is intended that prohibited loans include the acquisition by the plan of a debt instrument (such as a bond or note) which is an obligation of a party-in-interest. * * * Similarly, it is intended that it would be a prohibited transaction (in effect a loan by the plan to the employer) if the employer funds his contributions to the plan with his own debt obligations.

If the prohibited transaction is not corrected within a prescribed period, there is an additional penalty imposed equal to 100 percent of the amount involved. See Section 4975(b) of the Code. As matters now stand, an employer, like petitioner, which issues its promissory note as a contribution to an employee

[13] Significantly, the court of appeals in *Price* v. *Commissioner*, 106 F. 2d 336, 339 (C.A. 4), reversed *sub nom. Helvering* v. *Price*, 309 U.S. 409, relied upon the same loan analogy.

plan will not only fail to qualify for a deduction but will also be subject to a penalty for a prohibited transaction. Thus, by imposing such a penalty, Congress has again reaffirmed the actual payment requirement of Section 404(a) and strengthened its enforceability.[14]

2. In accordance with the foregoing analysis of the language of Section 404(a) and its legislative history, the Tax Court has consistently upheld the Commissioner's position that the delivery of a note is not a deductible "payment" within the meaning of Section 404(a) or its substantially identical predecessor, Section 23(p) of the 1939 Code.[15] In the Tax Court's view, the statute puts accrual and cash basis taxpay-

[14] Although petitioner acknowledges that the giving of its notes would be a prohibited transaction under ERISA, it contends (Br. 11) that the penalty provisions of ERISA have mooted the question presented. But there is still a live controversy between the parties as to the correctness of the Commissioner's determination of deficiencies against petitioner. The question therefore is not moot. See *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115; *Stewart* v. *Southern Railway Co.*, 315 U.S. 283, 284.

Moreover, while the enactment of ERISA diminishes the importance of the question for taxable periods beginning after the effective date of the penalty provisions (January 1, 1975), there is still a conflict of decisions for pre-ERISA years with respect to which there are 116 cases pending administratively with $3,675,000 of taxes at stake. (See Memorandum for the Respondent, p. 7.) At all events, the negative impact of the new legislation upon the importance of the question presented would call for dismissal of the writ of certiorari as improvidently granted, rather than the reversal of the court of appeals sought by petitioner in this case. See *Rudolph* v. *United States*, 370 U.S. 269.

[15] *Logan Engineering Co.* v. *Commissioner*, 12 T.C. 860; *Freer Motor Transfer Co.* v. *Commissioner*, 8 T.C.M. 507; *Sachs* v. *Com-*

ers upon the same footing with respect to what constitutes payment; payment means the liquidation of a liability in cash or its equivalent for all taxpayers, regardless of their method of accounting; and the delivery of a promissory note issued by an employer to his employees' plan is only a promise to pay and not actual payment.

Three courts of appeals, however, have held that the contribution of promissory notes to profit-sharing plans qualified as a deductible "payment" under Section 404(a) or its predecessor provision. See *Sachs* v. *Commissioner,* 208 F. 2d 313 (C.A. 3) (demand promissory note payable at a bank); *Time Oil Co.* v. *Commissioner,* 258 F. 2d 237 (C.A. 9) (noninterest-bearing promissory note); and *Wasatch Chemical Co.* v. *Commissioner,* 313 F. 2d 843 (C.A. 10) (five-year unsecured promissory note). Accord: *Advance Construction Co., Inc.* v. *United States,* 356 F. Supp. 1267 (N.D. Ill.).

These decisions, upon which petitioner relies (Br. 9–10), stand on two erroneous grounds. First, they assume that the term "paid" in Section 404(a) has

missioner, 11 T.C.M. 882, reversed, 208 F. 2d 313 (C.A. 3); *Slaymaker Lock Co.* v. *Commissioner*, 18 T.C. 1001, reversed *sub nom. Sachs* v. *Commissioner*, 208 F. 2d 313 (C.A. 3); *Time Oil Co.* v. *Commissioner*, 26 T.C. 1061, remanded, 258 F. 2d 237 (C.A. 9), supplemental opinion, 294 F. 2d 667 (C.A. 9); *Wasatch Chemical Co.* v. *Commissioner*, 37 T.C. 817, reversed, 313 F. 2d 843 (C.A. 10); *Patmon, Young & Kirk* v. *Commissioner*, 34 T.C.M. 798, affirmed, 536 F.2d 142 (C.A. 6); *Lancer Clothing Corp.* v. *Commissioner*, 34 T.C.M. 776, appeal pending, C.A. 2, No. 76–4012; *Coastal Electric Corp.* v. *Commissioner*, 34 T.C.M. 1007, appeal pending, C.A. 4, No. 75–2184.

the same meaning as in Section 267(a), which disallows certain deductions by accrual basis taxpayers of accrued but unpaid items to related cash basis payees. Second, they treat the delivery of a demand note as equivalent to the giving of a check.

a. The mistaken analogy between Sections 404(a) and 267(a) derives primarily from two decisions—*Anthony P. Miller, Inc.* v. *Commissioner,* 164 F. 2d 268 (C.A. 3), and *Musselman Hub-Brake Co.* v. *Commissioner,* 139 F. 2d 65 (C.A. 6). These cases respectively held that accrual basis corporations' delivery of their demand note to an officer for salary and to a controlling shareholder for royalties and interest "paid" these items within the meaning of Section 24(c) of the 1939 Code (the predecessor of Section 267(a)), which disallowed such expenses unless they are "paid" within two and one-half months after the close of the taxable year.[16]

But these decisions made clear that the meaning of the term "paid" in what is now Section 267(a) turned on the specific purpose of that statute to prevent tax avoidance by barring an accrual basis payor from claiming a deduction for an accrued but unpaid item that its closely related cash basis payee would not include in income until paid. See H.R. Rep. No. 1546, 75th Cong., 1st Sess. 29 (1937); S. Rep. No. 1242, 75th Cong., 1st Sess. 31 (1937). Because the recipients

[16] Petitioner relies (Br. 7–8) upon *Celina Mfg. Co.* v. *Commissioner*, 142 F. 2d 449 (C.A. 6), *Commissioner* v. *Mundet Cork Corp.*, 173 F. 2d 757 (C.A. 2), and *Akron Welding & Spring Co.* v. *Commissioner*, 10 T.C. 715, which are to the same effect.

of the promissory notes in those cases were required to include the fair market value of the notes in income at the time of receipt, the courts concluded that the policy of Section 267 would not be served by disallowing the deduction to the payor. As the Sixth Circuit observed in *Musselman Hub-Brake Co.* v. *Commissioner, supra*, 139 F. 2d at 68:

> [I]f the debtor credited to the account of the creditor sums under circumstances which would require reporting income constructively received or the creditor received property, either tangible or intangible having a cash value equal to the deduction claimed by the debtor, *the deduction would be allowable under the statute, because the creditor would be required to include these sums in his gross income.* [Emphasis supplied.]

See also *Logan Engineering Co.* v. *Commissioner*, 12 T.C. 860, 868.

The fact that Section 267 turns on considerations of symmetry of tax treatment between an accrual basis taxpayer and its related cash basis payee is further confirmed by the 1953 amendment to its predecessor provision, Section 24(c) of the 1939 Code. Section 202(a) of the Technical Changes Act of 1953, 67 Stat. 617, now set forth in Section 267(a)(2)(A) of the present Code, amended the statute to provide that the payor of interest or expenses could claim a deduction for those items as "paid" if the related payee is required to include them in income by application of the doctrine of constructive receipt during the payor's taxable year or within two and one-half months thereafter. See H.R. Rep. No. 894, 83d Cong., 1st Sess. 13

(1953); S. Rep. No. 685, 83d Cong., 1st Sess. 4 (1953); 96 Cong. Rec. A1979 (1950); 99 Cong. Rec. 11068–11069 (1953). The legislative history therefore demonstrates that Congress used the term "paid" in Section 267 in a special sense to insure that transactions between related persons receive consistent tax treatment.

However, these considerations of symmetry have no application to Section 404(a), which permits an employer to deduct contributions "paid" to an employee pension or profit-sharing plan. Pursuant to Sections 401(a) and 501(a), a qualified employee plan is exempt from tax. Thus, the policy of Section 267 has no relevance to what constitutes "payment" to an employee plan, because the employer's contributions are not taxed to the plan.[17] See Rev. Rul. 55–608, 1955–2 Cum. Bull. 546, 548; Rev. Rul. 71–95, 1971–1 Cum. Bull. 130.

b. The decisions of the Third, Ninth, and Tenth Circuits erroneously equate promissory notes with checks for federal tax purposes. Checks have replaced currency as the predominant medium of exchange and their delivery is therefore generally treated as the payment of cash for federal tax purposes. *Estate of Spiegel* v. *Commissioner,* 12 T.C. 524, acq., 1949–2 Cum. Bull. 3; Rev. Rul. 54–465, 1954–2 Cum. Bull. 93.

[17] The policy of symmetrical tax treatment is likewise inapplicable to Section 170(a), which allows a deduction for "payment" of contributions to qualified charities. As in the case of an employee plan, a qualified charitable organization is exempt from tax. Thus, Section 170 similarly requires actual payment in cash or its equivalent in order to qualify for a charitable contribution deduction. See pp. 22–23, n. 11, *supra*.

But as this Court's *Eckert* and *Price* decisions demonstrate, promissory notes, even fully secured demand notes as in this case, are not considered to be payment for tax purposes, but merely constitute a promise to pay. Indeed, the facts of this case demonstrate that promissory notes are not the equivalent of checks because petitioner systematically paid off its notes with checks eleven months after issuing the notes (A. 17, 18, 20). Given the fact that three of the four trustees of the employees' profit-sharing plan were petitioner's principal officers and shareholders, it is unrealistic to attribute any significance to the fact that petitioner's promissory notes were payable on "demand."

3. Although the determination of what constitutes payment under the Internal Revenue Code is a question of federal law (cf. *Morgan* v. *Commissioner,* 309 U.S. 78), the Uniform Commercial Code, now applicable in all of the states and the District of Columbia, distinguishes between checks and promissory notes and provides that promissory notes do not constitute payment. See 1 Anderson, *Uniform Commercial Code*, pp. ix–x (2d ed. 1970); 2 Anderson, *supra,* p. 596; La. Stat. Ann., Rev. Stat., Sections 10:1-101, 10:3-104 *et seq.* (1976 Supp.). The uniform rule, as represented by the Illinois law involved in this case, is that a check is a draft drawn on a bank and payable on demand, while a note is only a promise to pay. Section 3-104(2), Ill. Ann. Stat., c. 26 (1963). This promise to pay may be enforceable on demand or at a given time. Section 3-104(1)(c), Ill. Ann. Stat., c. 26 (1963). Section 3-802, Ill. Ann.

Stat., c. 26 (1963), provides that the underlying obligation is not discharged by giving a note, but rather is suspended pro tanto until the instrument is due or, if it is payable on demand, until its presentment. There is accordingly no basis for equating a promissory note with a check.[16]

In sum, state law is consistent with the rule we urge in this case, *viz.,* that a promissory note issued by an employer does not constitute "payment" to an employee plan under Section 404(a) prior to its actual payment in cash or in property which is the equivalent of cash.

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[16] The commercial law of Pennsylvania applicable in *Sachs* (now codified in Section 3-121, Pa. Stat. Ann. (1970)) treats the demand note payable at a bank involved there as a check because the bank is required to pay the note upon presentment. See 1 Hawkland, *A Transactional Guide to the Uniform Commercial Code*, pp. 481–482 (1964). This rule has been adopted by the District of Columbia and 18 other states (Alaska, Connecticut, Delaware, Hawaii, Kentucky, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Rhode Island, Texas, Vermont and Wyoming). The rule that a demand note payable at a bank is not equivalent to a check, has been adopted by 29 other states (Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia and Wisconsin). California applies this rule unless the bank is the drawee. In Virginia, however, the bank may at its option consider such a note as equivalent to a check. See 2 Anderson, *supra*, pp. 736–739; La. Stat. Ann., Rev. Stat., Section 10:3-121 (1976 Supp.).

But for federal tax purposes, a demand note payable at a bank under Pennsylvania law should not be treated as a deductible payment by the maker. In giving such a note, the maker does not intend an immediate outlay of assets, for he would otherwise have given a check.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 404. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OF ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN

(a) [as amended by Sec. 24, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] *General Rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income) but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

* * * * *

(3) *Stock bonus and profit-sharing trusts.*—

(A) *Limits on deductible contributions.*—In the taxable year when paid, if the contributions are paid into a stock bonus or profit-sharing trust, and if such taxable year ends within or with a taxable year of the trust with respect to which the trust is exempt under section 501(a),

in an amount not in excess of 15 percent of the compensation otherwise paid or accrued during the taxable year to all employees under the stock bonus or profit-sharing plan. If in any taxable year there is paid into the trust, or a similar trust then in effect, amounts less than the amounts deductible under the preceding sentence, the excess, or if no amount is paid, amounts deductible, shall be carried forward and be deductible when paid in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any such succeeding taxable year shall not exceed 15 percent of the compensation otherwise paid or accrued during such succeeding taxable year to the beneficiaries under the plan. In addition, any amount paid into the trust in any taxable year in excess of the amount allowable with respect to such year under the preceding provisions of this subparagraph shall be deductible in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any one such succeeding taxable year together with the amount allowable under the first sentence of this subparagraph shall not exceed 15 percent of the compensation otherwise paid or accrued during such taxable year to the beneficiaries under the plan. The term "stock bonus or profit-sharing trust", as used in this subparagraph, shall not include any trust designed to provide benefits upon retirement and covering a period of years, if under the plan the amounts to be contributed by the employer can be determined actuarially as provided in paragraph (1). If the contributions

are made to 2 or more stock bonus or profit-sharing trusts, such trusts shall be considered a single trust for purposes of applying the limitations in this subparagraph.

* * * * *

(6) *Taxpayers on accrual basis.*—For purposes of paragraphs (1), (2), and (3), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.404(a)-1 *Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred payment plan; general rule.*

* * * * *

(c) Deductions under section 404(a) are generally allowable only for the year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his returns on the accrual method of accounting. Exceptions are made in the case of overpayments as provided in paragraphs (1), (3), and (7) of section 404(a), and, as provided by section 404(a)(6), in the case of payments made by a taxpayer on the accrual method of accounting not later than the time

prescribed by law for filing the return for the taxable year of accrual (including extensions thereof). This latter provision is intended to permit a taxpayer on the accrual method to deduct such accrued contribution or compensation in the year of accrual, provided payment is actually made not later than the time prescribed by law for filing the return for the taxable year of accrual (including extensions thereof), but this provision is not applicable unless, during the taxable year on account of which the contribution is made, the taxpayer incurs a liability to make the contribution, the amount of which is accruable under section 461 for such taxable year. See section 461 and the regulations thereunder. There is another exception in the case of certain taxpayers who are required to make additional contributions as a result of the Act of June 15, 1955 (Public Law 74, 84th Cong., 69 Stat. 134), and the regulations thereunder.

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